FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION AND UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 45–107) is reported at 556 F. 2d 9. The opinions of the Federal Communications Commission (A. 6–40, 41–44) are reported at 56 F.C.C. 2d 94, and 59 F.C.C. 2d 892.

JURISDICTION

The judgment of the court of appeals (A. 115–116) was entered on March 16, 1977, and a petition for rehearing with suggestion for rehearing *en banc* was denied on May 10, 1977 (A. 117–119). On August 5, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including

October 7, 1977. The petition was filed on that date and was granted on January 9, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, consistent with statutory and constitutional limitations, the Federal Communications Commission may proscribe, at least during most hours, the radio broadcast of specified "indecent" words.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment of the United States Constitution, in pertinent part, provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. Section 1464 of the Criminal Code (18 U.S.C. 1464) provides:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

3. Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended (47 U.S.C. 326), provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

4. Section 303(g) of the Communications Act of 1934, 48 Stat. 1082, as amended (47 U.S.C. 303(g)), in relevant part, provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (g) * * * generally encourage the larger and more effective use of radio in the public interest.

STATEMENT

1. In the early afternoon of October 30, 1973, about 2:00 p.m., respondent's radio station WBAI-FM, in New York City, broadcast a recording of a monologue by comedian George Carlin entitled "Filthy Words." The monologue consisted of a twelve minute discussion of "the words you couldn't say on the public * * * airwaves * * * the ones you definitely wouldn't say, ever * * *" (A. 8, 19), and was included in a regularly scheduled program, "Lunchpail," devoted that afternoon to "a general discussion of the use of language in our society" (A. 3, 9). Immediately before the recording was played, the host of the program warned that it included sensitive language that might offend some listeners, advising them to change the station and to return to WBAI in fifteen minutes (A. 3–4, 9–10).

On December 3, 1973, the Federal Communications Commission received a complaint about the broadcast from a man in New York City who said he had heard the Carlin monologue over WBAI-FM while he was

driving in his car with his young son (A. 2–3, 8). The Commission forwarded the complaint to WBAI–FM with a request for comments (A. 9). In its response, the station defended its broadcast of the Carlin monologue on the "Lunchpail" program "as an incisive satirical view of the subject under discussion" (A. 3–4, 9–10).

2. On February 21, 1975, the Commission issued a Declaratory Order and supporting Memorandum Opinion (A. 6–19) addressing the complaint against WBAI–FM. It determined that the language used in the Carlin monologue was "indecent" and that the station's deliberate broadcast of the monologue therefore violated the prohibition contained in 18 U.S.C. 1464 against the utterance of "any obscene, *indecent* or profane language by means of radio communications * * *" [emphasis added]. Although authorized to impose various administrative and penal sanctions against licensees who violate Section 1464,[1] the Commission declined to order such sanctions against Pacifica in this instance,[2] choosing instead "to clarify the standards which the Commission utilizes to judge

[1] The Commission is empowered to revoke a station's license (47 U.S.C. (and Supp. V) 312(a)), to issue a cease and desist order (47 U.S.C. 312(b)), and to impose a monetary forfeiture (47 U.S.C. 503(b)(1)(E)) for a violation of 18 U.S.C. 1464.

[2] The Commission warned that "this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress" (A. 17).

'indecent language'" for the guidance of licensees in the future (A. 17).[3]

The Commission identified four factors which informed its decision to control the broadcast of offensive language (A. 13): "(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."[4] With these considerations in mind, the Commission concluded that certain words used in the Carlin monologue, all of which were "repeated over and over" and

[3] The Commission also noted that its Declaratory Order would permit not only Pacifica, but other parties affected by the Commission's action as well, to present their views before the Commission and to seek judicial review (A. 17).

[4] Five years earlier, in *WUHY–FM, Eastern Educational Radio*, 24 F.C.C. 2d 408, the Commission for the first time relied upon Section 1464's prohibition against the broadcast of indecent language. In that case, the Commission considered a broadcast in which expletives were repeatedly used. Noting that this language did not appeal to listeners' prurient interest and therefore could not be considered obscene as that term had been defined in prior case law, the Commission found that the broadcast was nonetheless "indecent," in violation of Section 1464, and fined the offending station $100 under 47 U.S.C. 503(b)(1)(E). Although the Commission stated that it would welcome judicial review of its action, the station declined to seek review.

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were "deliberately broadcast," were "indecent" and therefore within the prohibition of Section 1464 when aired by WBAI in the early afternoon "when children were undoubtedly in the audience" (A. 16–17).

Finally, the Commission invoked Section 303(g) of the Communications Act as additional authority for the Order (A. 18). Adverting to its "statutory obligation to promote the larger and more effective use of radio in the public interest," the Commission concluded that it would be "abdicat[ing its] responsibility to the public interest" if it took no step to prevent the "widespread use of indecent language on the public's airwaves" (*ibid.*).

Commissioner Robinson, joined by Commissioner Hooks, issued a concurring statement (A. 26–40) in which he emphasized that the Commission wished only to "regulate offensive speech to the extent it constitutes a public nuisance" and that he would probably consider the Carlin monologue unobjectionable "if it were broadcast at an appropriate hour and accompanied by suitable warning" (A. 35, 36 n. 9). Commissioners Reid and Quello, in separate concurring statements (A. 24–26), indicated that language such as that contained in the Carlin monologue could not in their view be lawfully broadcast at any time.

3. By a petition for clarification or reconsideration of the Order, the Radio Television News Directors Association sought a ruling from the Commission regarding the applicability of the Order to the broadcast of the listed sexual and excretory words in the context of "audio and video 'actualities' of angry

political demonstrations and even more structured political debate, interviews and conversations * * *" (A. 42). The Commission declined to address specifically the hypothetical problems raised in the petition, commenting only that it would be "inequitable" to sanction a licensee for the broadcast of material over which the licensee had no journalistic or editorial control (A. 43–44, and n. 1).

4. The court of appeals reversed the Commission's Order. Judge Tamm, in an opinion announcing the judgment of the court (A. 45–64), found that the Order violated Section 326 of the Communications Act of 1934, which prohibits the Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station * * *" (A. 52–59). In the alternative, Judge Tamm concluded that the Order was both unconstitutionally overbroad, because it "sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be" (A. 59–61), and vague "in that it fails to define children" (A. 61), the class whose presence in the audience the Commission deemed sufficient to transform otherwise protected uses of sexual or excretory words into prohibited "indecent" language.

Chief Judge Bazelon concurred in a separate opinion (A. 64–91). Suggesting that this Court's most recent definition of "obscenity" announced in *Miller* v. *California,* 413 U.S. 15, is the exclusive test for regulating offensive language (A. 71–77, 78–79, n. 22),

Judge Bazelon found that the Commission's definition of "indecent" as contained in Section 1464 was "massively overbroad" under *Miller* (A. 69, 74), because "the Commission does not test the 'indecency' of speech under 'local community standards,'" "appeal to the prurient interest is not to be considered," and "a work is not [to be] judged as a whole" (A. 74–75). Noting that the ban on the broadcast of sexual or excretory words when children may be in the audience would effectively censor the material available to "[a]dults with normal sleeping habits" (A. 85), Judge Bazelon concluded that no sufficiently compelling reason had been shown to justify that result (A. 80–91).

Judge Leventhal dissented (A. 91–100). He believed that the Commision's Order should be read narrowly—"limited to the language 'as broadcast' in the early afternoon" (A. 93–96, 104)—and, that "the issue of what might be broadcastable * * * [at other times] is not before us" (A. 104). He found that the Commission's "opinion on what is 'indecent' stands as a functional equivalent to the Supreme Court's current 'obscenity' ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation" (A. 97). He concluded that the Commission's prohibition against the broadcast of such material in the early afternoon constituted a reasonable "regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience" (A. 101), and which was necessary

to protect children who are at home unsupervised during the day (A. 99–100, 104–105).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The United States is a statutory party in this agency review proceeding. 47 U.S.C. 402(a); 28 U.S.C. 2344. Although the Department of Justice joined the Federal Communications Commission in defending its Order before the court of appeals—mistakenly, as we now believe—we did not support the petition for certiorari. The United States is accordingly a respondent here. Rule 21(4) of the Rules of the Court.[5]

But our participation at this stage is not merely as a formal party. The Commission's Order is founded on 18 U.S.C. 1464, a provision of the Criminal Code which the Department of Justice has an independent duty to enforce. As with respect to the anti-lottery provision in 18 U.S.C. 1304, "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296. Thus, a ruling by this Court will immediately affect the Department. What is more, in reaching its decision, the Court is entitled to know our position. See *id.* at 294–295.

These considerations sufficiently explain our separately submitting the views of the United States. Regrettably, after reconsideration, we cannot support

[5] We have amended the caption of the case accordingly.

the Commission's Order. We state our reasons in the pages that follow.

1. We begin (*infra,* pp. 12–17) by analyzing the Commission's Order in some detail to determine its precise scope. Our assessment is that it must be viewed as banning absolutely, for all but the very late evening hours, the radio broadcast of certain defined "indecent" words, regardless of their context. As for the late evening, we note that the Commission has merely "intimated" that it may permit such words to be aired, and then only on condition that their inclusion in broadcast material is not without "serious literary, artistic, political or scientific value" (A. 43).

2. We turn next to the statutory framework of the Order (*infra,* pp. 17–24). We join the Commission in its construction of the anti-censorship provision of the Communications Act (47 U.S.C. 326) as not disabling the agency (or the Department of Justice) from implementing the prohibitions of Section 1464. But we indicate our view that Section 326 forecloses any reliance on the "public interest" standard embodied in Section 303(g) of the same Act, as independent authority for any broadcast ban of "indecent" language.

We then address Section 1464. Our conclusion is that the statute, on its face, authorizes a proscription of "indecent" language that is not obscene, regardless of context, and therefore supports the Commission's Order. We consider and reject the argument that this Court has foreclosed such a reading of Section 1464

by narrowing the scope of other similarly worded, but differently effective, federal statutes. Yet, of course, we accept that constitutional limitations may confine the apparently wide scope of the statute.

3. When we come to consider the effect of the First Amendment (*infra,* pp. 24–28), our first conclusion is that the "indecency" provision of Section 1464, as construed by the Commission, cannot qualify as a permissible anti-obscenity statute. Accordingly, we explore the indications in this Court's decisions that appear to govern "nuisance" or "zoning" laws that prohibit or channel non-obscene speech. Putting aside "fighting words" as irrelevant to this case, we suggest that nuisance or zoning laws that affect protected expression must be tested according to three criteria: (a) the degree of offensiveness of the matter sought to be proscribed, (b) the extent to which unwilling viewers or listeners are in a "captive" audience, and (c) whether the prohibition or restriction will have a significant deterrent effect on uninhibited speech.

4. Finally (*infra,* pp. 28–41), we seek to apply these criteria to the Commission's Order. First, we test the ruling as though it banned the radio broadcast of the defined "indecent" words for all hours. We note the flaw in any suggestion that a radio ban has only limited impact. And we then examine the arguments which are said to make the radio situation unique.

We reject the notion that the inherent limits of the radio medium justify a ban that is not related to diversification. Focussing on the claim that radio is par-

ticularly "intrusive," we suggest the answer lies in the ease with which the offending program can be turned off and the alternative of banning the *instrument* from certain locales, rather than censoring at source. And we address the Commission's concern for the young audience, concluding that the inevitable presence of young listeners in the audience cannot justify condemning adults to hearing only "what is fit for children."

We then consider the suggested lifting of the ban on the broadcast of "indecent" language in the late evening. We note that, even then, the exemption would be too grudging. But, more fundamentally, we submit that, because, at all times, the radio audience will include both children and adults, any exemption for a limited time period will both censor adults and fail to protect children. Tentatively, we suggest that proscribing the use of "indecent" words in broadcasts *specifically aimed at children,* regardless when aired, might avoid the objections we have entered.

Our conclusion is that the Commission's Order misapplies the statute, construed in light of constitutional limitations.

II. THE BREADTH OF THE COMMISSION'S ORDER

There has been some disagreement about the breadth of the Commission's Order. Judge Leventhal, dissenting in the court of appeals, apparently viewed the agency's decision as reaching only the incident in suit, focussing on the ultimate ruling that "the language *as broadcast* was indecent and prohibited by 18

U.S.C. 1464" (A. 17, 93–94, 104; emphasis added). In its brief before this Court, the Commission endorses that view (pp. 20–21, 41–45). Judge Tamm (A. 47–48) and Chief Judge Bazelon (A. 66 n. 2), on the other hand, read the order more broadly. But, characterizations aside, the scope of the agency's ruling is reasonably clear.

1. The Carlin monologue contained seven words which the Commission expressly identified as "indecent" (A. 16–17). The *words themselves*—not the inflexion or emphasis of the speaker, their gratuitous inclusion, the context, or any other surrounding facts—were flatly declared to "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and * * * accordingly [to be] 'indecent' when broadcast on radio or television" (*ibid.*). And that definition holds good 24 hours a day (A. 16).

Except perhaps for the "late evening hours" (see below, pp. 15–16), such "indecent" words are banned absolutely, regardless of context. That is made very clear. The Commission expressly says that, while the basic ban operates, "such words * * * have no place on radio," and that "indecent language * * * cannot be redeemed by a claim that it has literary, artistic, political or scientific value" (A. 15). In a final passage, the Commission itself labels the effect of its ruling as "[p]rohibiting the broadcast of 'filthy words' considered indecent particularly when children are in the audience," pointing out that "the number of words which fall within the definition of indecent

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is clearly limited" (A. 18). Finally, while the second opinion issued on the Petition for Clarification notes that the Commission is ruling "in a specific factual context" (A. 43), nothing is taken back except for live coverage of public events where "there is no opportunity for journalistic editing" (A. 43 n. 1).

In sum, it seems to us impossible to read the Commission's order in any way except as an absolute ban, for most broadcasting hours, on the utterance of any of the specified words, regardless of context. Indeed, that is what the Commission intimated in its 1960 *Programming Policy Statement*, reproduced here in its Brief (p. 32), when suggesting that the "four-letter words" in *Lady Chatterley's Lover* would violate Section 1464 of the Criminal Code.

To be sure, the Commission did point out that, in the Carlin monologue, the offending words were "repeated over and over" (A. 17). But this is perhaps no more than an aspect of the conclusion—fully justified—that the language, which was pre-recorded, was not an inadvertent "slip of the tongue," but "was *deliberately* broadcast," so as to bring into play a provision of *criminal* law (*ibid.*; emphasis added). It would be wholly unjustifiable to read that casual remark as qualifying the plain statement that the identified words have "no place" on radio while children are potential listeners.

2. Because we cannot construe the Commission's order as in any way turning upon the context in which the offending words were used, we do not discuss the question how far their use may have been "redeemed"

by the purpose for which they were included in Carlin's monologue. But it is right to note one or two points. First, from all that appears (see A. 3–4), the "Lunchpail" program, during which the monologue was played, was in no sense a "children's program" or one directed at juveniles. Second, the utterance of the "indecent" words was not gratuitous, but was essential to the subject discussed. Nor were the offending words, in their context, remotely directed *at* anyone, with or without hostility. And, finally, the language objected to was not appealing to prurient interest. Indeed, the Commission's order expressly defines "indecent language" as "lack[ing] the element of appeal to the prurient interest" (A. 15).

3. If the Commission's ban on the broadcast of "indecent" words is absolute while it lasts, there is at least an "intimation" (A. 43) that the "late evening" is exempted. If we put all the indications together, "when the number of children in the audience [is] reduced to a minimum" (A. 43) appears to mean "the late evening hours" (A. 15), in turn defined as beginning at 10 p.m. (A. 11). Even after that time, the Commission has not firmly committed itself to lifting the ban, first saying that an exemption for the late evening is "conceivable" (A. 15) and later characterizing that hint as an "intimation" (A. 43). In these circumstances, it is tolerably clear that the prohibition on the broadcast of "indecent" words is not restricted to the "early afternoon" when the Carlin monologue was in fact aired (see A. 17).

If there is an exemption for the period after 10 p.m., that lifting of the ban is strictly conditioned. "Sufficient warnings" would have to be given and, more important, the broadcast of "indecent" words would be permitted only "if in the context used the language had serious literary, artistic, political or scientific value" (A. 43–44; see also A. 15–16).

4. Although, in one place at least, the order encompasses both radio and television (A. 17), there are sufficient references to the peculiarities of the radio medium, not all shared by television (*e.g.*, A. 13), to justify the conclusion that the Commission is announcing a rule governing radio alone. On the other hand, all disclaimers aside (*e.g.*, A. 44), it is evident that the Commission has, through the present declaratory order, made an important policy statement which it intends to apply across the board to radio broadcasting. To be sure, this was an "adjudicatory," rather than a "rule making," proceeding (see 5 U.S.C. 553, 554). But, as the order itself recites, the decision was intended "to clarify the standards which the Commission utilizes to judge 'indecent language'" (A. 17) and to "set forth its position" with a view to preventing the "widespread use of indecent language on the public's airwaves" (A. 18).

5. Finally, the Commission candidly disclaimed any pretense that the words identified, or the Carlin monologue as a whole, qualified as "obscene" speech, so as to be, on that ground, outside the protection of the First Amendment. On the contrary, the order characterizes the offending words as "indecent"—a category

separately prohibited by Section 1464—explicitly distinguishing such language from the obscene in that (as we have seen) "indecency" lacks appeal to prurient interest and cannot be redeemed by its context (A. 15).

Accordingly (and correctly in our view), the Commission did not invoke the rule of *Miller* v. *California,* 413 U.S. 15 (A. 7, 14), but, instead, sought constitutional authority for its result in the "public nuisance" doctrine, asserting that it was merely "channelling" offensive language away from "an inappropriate place" (A. 17, 42). The Commission appears to adhere to that analysis in its brief before this Court (see pp. 2, 28–32, 46–48). We believe that is a correct formulation of the issue.

III. THE STATUTORY FRAMEWORK

There are three statutory provisions of arguable relevance in this case: Section 326 of the Communications Act (47 U.S.C. 326), Section 303(g) [6] of the same Act (47 U.S.C. 303(g)), and Section 1464 of the Criminal Code (18 U.S.C. 1464).[7] We consider each of these sections in turn.

1. Section 326 of the Communications Act withholds from the Commission any "power of censorship" with respect to radio broadcasts and enjoins it

[6] The "public interest" criterion is also included in 47 U.S.C. 307(a), 307(d), and 309(a).

[7] We omit provisions which merely authorize the Commission to implement Section 1464 through non-criminal sanctions: 47 U.S.C. (and Supp. V) 312(a), 312(b), 503(b)(1)(E). See FCC Brief, pp. 2–4.

from "interfer[ing] with the right of free speech by means of radio communication." Circuit Judge Tamm deemed this prohibition dispositive against the validity of the order. A. 54–58, 64. For our part, however, we agree with Chief Judge Bazelon (A. 68–69) and the Commission (Brief, p. 5, 8) that Section 326 does not resolve the case.

As the Commission has noted, in the original Radio Act of 1927 (Section 29, 44 Stat. 1172–1173), as in the Communications Act of 1934 (Section 326, 48 Stat. 1091), the identical words now found in Section 326 were followed, in the same section, by the prohibition on the utterance of "obscene, indecent, or profane language" now codified in Title 18 as Section 1464. It must follow, it seems to us, that the two provisions should be accommodated.

It may be that the prohibition of "censorship" in Section 326 means only prior restraint and does not immunize the broadcaster from subsequent sanctions. But cf. *Farmers Union* v. *WDAY,* 360 U.S. 525. At all events, we must read the "right of free speech" as not embracing "obscene, indecent, or profane language," except only as the First Amendment may intervene. Any other construction would accord little respect to the Congress that placed the two provisions in adjoining sentences.

2. This is not to read Section 326 out of the Communications Act, of course. In all other contexts, it severely restrains the Commission. And, even with respect to the ban of "indecent" words, Section 326,

we believe, forecloses reliance on any authorization other than Section 1464.

Thus, we submit the Commission cannot justify its order as implementing its "statutory obligation to promote the larger and more effective use of radio in the public interest" under Section 303(g) of the Communications Act (A. 18; see also FCC Brief, pp. 39–40). Indirect curtailment of one kind of speech in order to give access to diversified views may be permitted. But, in light of Section 326, the Commission is barred from invoking the "public interest" to wholly ban from the airways, at least for most hours, one species of language on grounds that have nothing to do with "balance" or diversity.

3. In our view, Section 1464 of the Criminal Code is the statute that governs this case. It forbids broadcasting "any obscene, indecent, or profane language." Constitutional inhibitions aside, there is no difficulty in understanding this provision. On its face, it would seem plainly to support the Commission's decision.

a. First, the use of the disjunctive indicates that the prohibition encompasses language which is *either* obscene *or* indecent *or* profane. To the suggestion that the three epithets mean the same thing, the short answer is that we must, if possible, avoid the conclusion that Congress was indulging in senseless redundancy. Cf. *United States* v. *Limehouse,* 285 U.S. 424, 427. Accordingly, it would seem perfectly reasonable to construe "indecent" as including words and phrases referring to sexual or excretory organs or

functions which, as used, do not appeal to prurient interest and therefore are not embraced within the category of "obscene language."

b. Next, since the statute expressly focuses on "language," not thoughts, messages or descriptions, the natural reading of the provision is that it bans the use of certain words and phrases, regardless of their context. This is not to be wondered at if one remembers that when the statute was written (1927) even the largest dictionaries avoided spelling out in full the most provocative "filthy" words. At that day, it might well have been answered to those who pointed to "dirty words" in the Bible, or Shakespeare, or elsewhere in literature or science or law, that the objectionable passages must not be read on the air, or must be Bowdlerized. It would follow that, under the statute, the Commission was entitled to ban use of certain words absolutely, without considering whether they were "redeemed" by the artistic or other values of the broadcast in which they were included.

c. It would seem equally clear, from the statutory prohibition on uttering "any" indecent language, that a single mention of the offending word was forbidden, even without emphasis or repetition. And so, the Commission's flat ban of any use of words and phrases defined as "indecent" would be justified.

d. No doubt, the category of "indecent" words and phrases is not self-defining. But, if we assume, as we must, that the class is not entirely empty, we must accept that most, if not all, of the words selected by George Carlin meet the test. Quibbles about one word

aside,[8] the Commission cannot be faulted for mislabelling.

e. While Section 1464 announces a flat ban, it may, perhaps, be construed to allow a more discriminating time-limitation. As we have noted, the Commission has not finally committed itself on this point. But if the First Amendment requires a partial exemption, we do not suppose the plain congressional intention to impose a ban so far as constitutionally permissible ought be defeated. At all events, it is the ban, not the exemption, that is challenged here.

f. It is suggested, however, that this Court has, in effect, construed Section 1464 as authorizing a ban on "obscenity" only, as defined in *Miller*. One court of appeals has so concluded, *United States* v. *Simpson*, 561 F. 2d 53 (C.A. 7). Of course, if that is right, it is the end of the case since the Commission acknowledges that the Carlin monologue was not obscene within that definition. But we do not so read this Court's decisions.

The Court, it is true, has indicated that other federal statutes, Section 1461 and 1462 of the Criminal Code, proscribing not only the "obscene" but also materials that are "lewd," "lascivious," "indecent," "filthy," "vile," or "immoral," should be read as reaching only obscenity. *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 130 n. 7; *Hamling* v. *United States*, 418 U.S. 87, 114; *Marks* v. *United States*, 430 U.S. 188, 190; *Smith* v. *United States*, 431 U.S. 291, 299–300. See also *Manual Enterprises, Inc.* v. *Day*, 370

[8] See Judge Leventhal's question about the word "tit" (A. 106 n. 16).

U.S. 478, 482–484 (opinion of Harlan, J.). Do those rulings control here?

Plainly, insofar as Section 1464 is merely an anti-obscenity statute, its constitutional reach can be no greater. See *infra,* pp. 24–26. But, as we have seen, the statute purports to be an anti-nuisance law as well. That claim could not reasonably be made for Sections 1461 and 1462 of the Criminal Code which prohibit the importation or transportation of offensive materials usually packaged in plain wrappers. Here, on the contrary—as perhaps also with Section 1463 dealing with wrappers and envelopes—the communication is "unwrapped" and nuisance concerns may be relevant. See Commissioner Robinson, concurring, at A. 32–33.

Nor is there a serious vagueness problem here—the concern that first led the Court to suggest a narrow redefinition of Section 1462 (*12 200-ft. Reels of Film, supra,* 413 U.S. at 130 n. 7). While, presumably, the Commission is not restricting its ban to the seven words which George Carlin thought *verboten* on the airways, it has pointed out that "the number of [such] words • • • is clearly limited" (A. 18) and has adopted a definition that tracks, as near as can be, part (b) of the *Miller* standard (A. 15, 16, 16–17). Indeed, so far as we are aware, the specificity of the ban is not challenged.

It may well be—as we ourselves suggest in a moment (*infra,* pp. 29–39)—that the Commission's order reaches beyond constitutional limits. But we cannot suppose that this Court's indications about other federal statutes were intended to foreclose, as a

matter of statutory construction, a reading of Section 1464 that would give it force beyond the strict boundaries of obscenity. If the First Amendment does not prevent it, we believe the Commission still remains free to apply the statute as a nuisance law.

g. Nothing in the meager legislative history casts any doubt on this construction of Section 1464.[9] Accordingly, were it not for constitutional considerations, there would be no justification for cutting down the plain words of the provision. But, of course, there *are* constitutional inhibitions that must be taken into account, and it is our duty to save the provision, if possible, from unconstitutionality. On the other hand, in rescuing the statute, we ought not narrow it more than constitutional mandates require. It may safely be assumed that Congress meant to go to the constitutional limit.

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[9] As we have already noted, Section 1464 was first enacted as part of Section 29 of the Radio Act of 1927, 44 Stat. 1172–1173, which later became Section 326 of the Communications Act of 1934, 48 Stat., 1091. Neither the committee reports nor the floor debates relevant to these measures contain any discussion of its intended scope. See S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926); S. Doc. No. 200, 69th Cong., 2d Sess. 19 (1927); H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934). In 1947, as a part of a revision of the Criminal Code, Section 1464 took its present form when the prohibition against the broadcast of offensive language contained in Section 326 of the Communications Act, together with its corresponding penalty provision in Section 501 of the Act, were incorporated into a new section and placed in Chapter 71 of Title 18 along with the other federal criminal statutes regulating offensive materials. The legislative history of this recodification makes no reference to the intended scope of Section 1464. See H.R. Rep. No. 304, 80th Cong., 1st Sess. A106 (1947).

With that caution in mind, we turn to consider how far Section 1464 can be squared with the Constitution, while preserving as much as possible of the apparent congressional intent.

IV. CONSTITUTIONAL LIMITATIONS

1. This is not an obscenity case. The Commission, as we have noticed (*supra,* pp. 16–17), does not suggest that the Carlin monologue was "obscene." Nor could it do so, since the material was not judged "as a whole," was not found to "appeal to prurient interest," and the condemned words, it was ruled, could in no event (at least until 10 p.m.) be redeemed in their context by "serious literary, artistic, political, or scientific value." *Miller* v. *California, supra,* 413 U.S. at 24.

Nevertheless, there recurs in some of the papers before the Court the notion that, somehow, the obscenity standard may be different in the case of radio broadcasts with children as part of the audience. In our view, any such argument is now foreclosed. Very briefly, we state our reasons.

Quite deliberately, it seems to us, the Court has announced a single standard. It applies to both the state and federal governments. *United States* v. *12 200-ft. Reels of Film, supra,* 413 U.S. at 130; *United States* v. *Orito,* 413 U.S. 139, 145; *Hamling* v. *United States, supra,* 418 U.S. at 105–106; *Marks* v. *United States, supra,* 430 U.S. at 190; *Smith* v. *United States, supra,* 431 U.S. at 299–300. It applies whether the "consumer" is an unwilling recipient, *Miller, supra,* 413 U.S. at 18; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, or a willing adult, *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49; *12 200-ft. Reels of Film, supra.* And, most important, the Court has said that the same standard governs every medium of expression. *Kaplan* v. *California,* 413 U.S. 115, 118–119.

This is not to deny that "[e]ach method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502–503. Of course, that is so: "live" performances, motion pictures, still photographs, drawings, spoken words, and the unillustrated book, although depicting or describing the same sexual conduct, will have varying impact, so that what is deemed "patently offensive" or "pruriently appealing" in one form may not be in another. But "the basic principles * * * do not vary" [*ibid*]. The obscenity standard remains the same.

Nor is there any basis for supposing that a different standard governs when children are part of a mixed audience. In fixing the standard, the Court took into account the inevitable exposure of children to most forms of pornography. See *Miller, supra,* 413 U.S. at 28; *Kaplan, supra,* 413 U.S. at 120; *Orito, supra,* 413 U.S. at 143. It is not settled how much of the "variable obscenity" doctrine of *Ginsberg* v. *New York,* 390 U.S. 629, survives today. See *Erznoznik, supra,* 422 U.S. at 214 n. 11. But that rule only permitted a finer sieve to be used when *children alone* were affected. It has always been clear that, when the two audiences could not be separated, adults could not be censored for the sake of the children. *Butler* v. *Michigan,* 352 U.S. 380; *Miller, supra,* 413 U.S. at 36;

Erznoznik, supra, 422 U.S. at 212–214. Significantly, in striking down the conviction in *Jenkins* v. *Georgia,* 418 U.S. 153, the Court did not deem it necessary to notice whether juveniles had been admitted to view the film.

2. But even if there were a "variable obscenity" standard dependent upon the medium and the likely presence of children, it is plain the Commission's order in this case would not satisfy it. For such a diluted test would still require asking two questions the order expressly holds irrelevant: "Does the material, taken as a whole, appeal to the prurient interest of children when broadcast on radio?", and "Do the offending words, in their context, lack serious literary, artistic, political, or scientific value for children when broadcast on radio?" See *Ginsberg, supra,* 390 U.S. at 645–647.

We have said more than enough about obscenity. We turn now to the Commission's "nuisance" and "channelling" or "zoning" submissions.

3. It is no longer debatable that speech, although not obscene, can be prohibited in some situations. And it is idle to pretend that content is never noticed. We may put to one side, as wholly irrelevant here, so-called "fighting words." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572. More closely in point are cases in which the prohibition depends on time or place. A sufficient example is the classical illustration of "falsely shouting 'fire' in a theatre." *Schenck* v. *United States,* 249 U.S. 47, 52 (per Holmes, J.). Another obvious instance is abusive language addressed

to a court, punishable as contempt. Further examples are the ban on political advertisements aimed at the "captive audience" of streetcars, sustained in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, and the zoning ordinance prohibiting "adult films" in certain residential districts upheld in *Young* v. *American Mini Theatres,* 427 U.S. 50. The question is whether the present order is within the principle of such cases.

At first blush, the answer would seem to be given by *Cohen* v. *California,* 403 U.S. 15, and its progeny. *Gooding* v. *Wilson,* 405 U.S. 518; *Rosenfeld* v. *New Jersey,* 408 U.S. 901; *Brown* v. *Oklahoma,* 408 U.S. 914; *Cason* v. *City of Columbus,* 409 U.S. 1053; *Papish* v. *University of Missouri Curators,* 410 U.S. 667; *Plummer* v. *City of Columbus,* 414 U.S. 2; *Hess* v. *Indiana,* 414 U.S. 105; *Lewis* v. *New Orleans,* 408 U.S. 913, reversed and remanded, 415 U.S. 130. See, also, *Spence* v. *Washington,* 418 U.S. 405; *Erznoznik* v. *City of Jacksonville, supra.* Indeed, in *Cohen,* the Court ruled that the First Amendment barred the prosecution of a young man in a public building whose jacket was emblazoned "Fuck the Draft," and in the subsequent cases convictions for publishing or uttering like offensive words on the street or in other public places were vacated or reversed.

It would be rash, however, to make too much of those decisions. What can perhaps be safely deduced from these cases is that the First Amendment prevents any attempt to *wholly outlaw* from the public language, on the ground that some will be offended, the vocabulary described in George Carlin's "Filthy

Words." But this does not resolve the question whether such words, even innocently spoken, can be proscribed for certain times and places. We assume *some* regulation is constitutionally permissible.

If that is so, applying the indications given in *Cohen, Lehman, Erznoznik* and *Young,* the relevant questions appear to be:

(a) How offensive, to how many, is the expression sought to be proscribed?

(b) How "captive" is the audience of unwilling viewers or listeners? and,

(c) How limited, or significant, in its deterrent effect on uninhibited speech, is the proposed ban?

With these criteria in mind, we return to the Commission's order in this case.

V. IS THE COMMISSION'S BAN LAWFUL?

We have expressed the view that, but for constitutional limitations, the Commission's order would be authorized by Section 1464. But the statute, if it is to survive—as we believe it may—must of course be read to permit only such interference as is consistent with the First Amendment. Accordingly, we test the Commission's order directly under the Constitution, on the assumption that Section 1464 goes to the constitutional limit.

At the outset, we consider whether a *total* radio ban, with no exemption, of the identified "indecent" words would be lawful. In our view, that is not a false question, for several reasons. First, the Commis-

sion as a whole has not finally determined whether to lift its ban for any period, two Commissioners having clearly stated that they would not. Second, the surcease "intimated" in the order is so conditional as scarcely to ameliorate its chilling effect on speech. Third, in our view, the very limited exemption suggested cannot save the ban. And, finally, since the greater presumably includes the less, it is convenient to test the broader proposition first. We shall then examine the effect of a possible time limitation.

A. A TOTAL RADIO BAN

1. It is arguable, of course, that even a total prohibition, limited to a single medium, is no more than a "place" regulation, and therefore is distinguishable from the more sweeping "offensive" language laws condemned in such cases as *Cohen, Brown, Hess,* and *Lewis.* A radio ban, it can be said, will not "have a significant deterrent effect" on protected speech. See *Young, supra,* 427 U.S. at 60.

Proscribing the use of certain words on radio only, does not prevent authors from incorporating them in their scripts for theatre or cinema or nightclub or lecture hall, or including them in printed materials; nor does it deprive the public from hearing them or reading them through all media other than broadcasting. And it goes without saying that, even if they were shunned by professional writers and entertainers and public speakers in other forums, a radio ban against the "indecent" words identified here will not imperil their survival in everyday speech. Thus, it could be

said that banning such words from the airwaves would not significantly affect freedom of speech.

The short answer to this, as the Court has reiterated, is that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 163, quoted and applied in *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 556. Besides, although the proportion is small, there are a substantial number in our population who depend almost exclusively on radio for entertainment, and for much else. We need only think of the blind. For them, it is no good saying they can hear uncensored language elsewhere. A radio ban would, for some, have a significant impact.

There is, moreover, another difficulty with the argument. It is that it can be made for each medium and each locale. Forbidding the offensive words at the cinema alone, or at sports events alone, could be claimed to be equally "harmless." If each such ban were viewed in isolation, one could perhaps justify proscribing "indecent" language in every discrete public forum, with the consequence that the words were (legally, at least) confined to the home. That would, of course, be impermissibly expanding the constitutionally limited area of obscenity in all but name. The exceptions would soon swallow the rule which gives constitutional protection to speech which is not obscene.

A prohibition of otherwise protected speech is not permissible under the First Amendment merely because it is limited to certain places or certain times. Every such regulation must be justified by special circumstances. *Erznoznik, supra,* 422 U.S. at 209–212. Accordingly, we turn to examine whether the unique characteristics of the radio medium support a ban on "indecent" words that would not be constitutionally valid elsewhere.

We begin by examining the special considerations identified by the Commission and by Judge Leventhal, dissenting below.

2. *The "scarce medium" and the "public interest."* Like Chief Judge Bazelon (A. 89) and Commissioner Robinson (A. 33 n. 7), we do not appreciate how the character of radio as a medium of "limited access" is relevant here. To be sure, the Court has sustained rules implementing the Commission's responsibility to assure that the limited medium of radio will be used in the "public interest," with "balanced programming" and access, so far as possible, to all points of view. *E.g., Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 397. Those considerations justify the Commission in requiring radio stations to afford air time to differing opinions and might sanction an order compelling a particular station that confined itself to "indecent" programs to diversify. But nothing of the sort is remotely involved in this case.

Nor can the congressional mandate to allocate the airways "in the public interest" (47 U.S.C. 303(g),

307(a) and (d), 309(a)) of itself justify a total ban on any category of protected speech. As we have said (*supra,* p. 19), whatever else the statutory prohibition on censorship means, it cannot tolerate the application of a "public interest" standard in this way, unless there are other compelling reasons.

3. *The "intrusiveness" of radio.* Much has been written about how radio, partly because it is ubiquitous and partly because of the common practice of indiscriminately "flipping the dial," tends to be particularly intrusive.

To be sure, radios today, relatively cheap and portable as they are, can invade any area. Thus, "indecent" words when broadcast may reach the public streets, places of recreation, shops, schools, business offices, private cars and the home. And many unwilling hearers may be offended. Of course, without the aid of radio, the human voice can do the same. But, here, the risk is compounded because the operator of the radio does not customarily consult a guide before scanning the dial, and may, quite inadvertently, subject both himself and those near him to "indecent" language.

This would be troublesome indeed, if the radio receiver, once activated, could not be turned off. But, considering the ease and speed with which the offensive program can be switched off, it is difficult to appreciate why the radio situation is not *less* troublesome than that of the vulgar jacket in *Cohen* or the nude portrayals in *Erznoznik,* as to which the Court reasoned that "the burden normally falls upon the

viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes'." 422 U.S. at 210–211. And see, *id.* at 220–222 (Burger, C. J., dissenting).

What is more, disabling the Commission from banning the broadcast of "indecent" words does not prevent local regulations restricting the time and place where, or the volume at which, radios can be played so as to avoid annoyance to others. Indeed, it may be that a narrowly drawn ordinance can be devised that would prohibit the operator of a receiver from offending more sensitive members of the public by declining to turn off an "indecent" program in identified public locales. Protection of the unwilling audience, and especially of the "captive" audience, does not require a total ban at source.

Nor do we easily appreciate why radio is more offensive than other media because it can enter the home. So can "indecent" publications and even films—not to mention "rough-talking" people. Of course, the special privacy interests of the home justify limited regulations against uninvited intrusions. *E.g., Rowan* v. *Post Office Dept.,* 397 U.S. 728; *Kovacs* v. *Cooper,* 336 U.S. 77. But, except for the fleeting moment when the owner inadvertently tunes in to "indecent" language, the offensive broadcast penetrates the home only by invitation. And, of course, the private home is the one place where even obscenity is beyond the power of government to suppress. *Stanley* v. *Georgia,* 394 U.S. 557.

In our submission, the answer to the intrusion argument is, as this Court has had occasion to notice

in contrasting other messages less easily avoided, that "[t]he radio can be turned off." *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302; *Packer Corporation* v. *Utah,* 285 U.S. 105, 110. Cf. *Rowan, supra,* 397 U.S. at 737. The brief assault on sensibility from an inadvertent sweep of the dial is, after all, confined to *words,* and words by definition not obscene. Coarse language can offend, to be sure. But, it does not have the immediacy of the live image. Different considerations would be presented if we were dealing with an offensive *pictorial* representation on television, the impact of which might be less easy to erase by switching off the set. It is difficult to say the same of one or several "indecent" words, usually employed as mere expletives without specific meaning.

4. *"For the sake of the children."* Finally, and with special emphasis, those who urge a ban, full-time or part-time, on the broadcast of "indecent" words express concern for the children in the audience. For the moment, we address that consideration on the hypothesis that a substantial number of young ears will always be in the audience and that, if they are to be spared "indecent" words on radio, such language must be banned at all times.

The basic difficulty is that it is impossible, as a practical matter, to segregate the radio audience between adults and minors. If that were possible—as it is, in principle, for films and to a lesser extent for publications—an accommodation might be made. Even then, questions would arise about the independent First Amendment rights of minors. See *Erznoznik, supra,* 422 U.S. at 212–214. But, as things are, the in-

evitable effect of a ban aimed at protecting minors is to "reduce the adult population," at least during most waking hours, to hearing on radio "only what is fit for children." *Butler* v. *Michigan, supra,* 352 U.S. at 383. That cannot be squared with the First Amendment.

We have already seen that the Court has firmly settled, in the context of obscenity claims, that the First Amendment rights of adults cannot be abridged for the sake of the children. The same principle holds good when "nuisance" law confronts the First Amendment. Where the two audiences cannot be separated, the presence of children has not changed the constitutional boundary. *E.g., Cohen, supra,* 403 U.S. at 16; *Papish, supra,* 410 U.S. at 676; *Erznoznik, supra,* 422 U.S. at 212–214.

The radio medium is not unique in this respect. The cases just cited illustrate that public buildings and the public streets are not off-limits to the very words involved in this case despite the inevitable presence of young listeners. The Court, moreover, has noted that it is not "realistic" to suppose that pornographic books, magazines and pictures can be kept out of juvenile hands if available to adults, *Slaton, supra,* 413 U.S. at 58 n. 7. And it has expressed doubts about the effective policing of "adult" movie theatres. *Ibid.* But this has not led the Court to read the First Amendment as tolerating a ban on merely "indecent" books, pictures or films. We cannot suppose that the inevitable presence of youngsters in the radio audience is of greater constitutional relevance.

At all events, it may be doubted whether the exposure of juveniles to mere "indecent" words on radio

is, today, a matter of the gravest concern. If one is to follow the Court's realistic approach, it must be conceded that very few contemporary youngsters have not heard and read the same words elsewhere. To be sure, the dissemination of such language on the public airwaves may seem to add a dimension of apparent approval. But parental standards have not lost all their force in correcting any such misapprehension. There are perhaps other aspects of broadcasting that more urgently invoke the Commission's solicitude for the young.

B. THE PARTIAL BAN

Thus, far, we have been addressing the question as though the Commission had banned "indecent" words from radio broadcasting *at all times*. That is, of course, not the case. The Commission, to use its final vocabulary, has at least "intimated" that the offending words might be spoken "when the number of children in the audience was reduced to a minimum," provided "sufficient warnings" are given and provided further the offensive language used is shown to have, in context, "serious literary, artistic, political or scientific value" (A. 43–44). For several reasons, we suggest this very limited exception does not save the Order.

1. We take no issue with the warning requirement, albeit it will presumably be of limited effect in protecting the indiscriminate listener who tunes in too late to hear it.[10] Indeed, practical considerations aside,

[10] In this very case, the offended listener presumably missed the warning that had been broadcast (see A. 3–4). We note, however, that this listener, despite the presence of his young son, apparently did not switch off his car radio until he had heard most, if not all, of the "indecent" words broadcast (see A. 2–3).

a notice rule seems a proper application of the "nuisance" doctrine espoused by the Commission.

But it is not clear whether imposing a condition of "serious" redeeming value—which would immunize even otherwise obscene material—is not too strict a standard for merely "indecent" words. No such qualification has been deemed proper for the use of the same words with respect to any other medium or forum. It may well be that the special problems of radio would justify *some* regulation of *wholly gratuitous* verbal assaults by indecent language. See pp. 40–41, *infra*. But it seems wrong to apply the test of obscenity to what is by definition not obscene.

2. We might object also that the Commission is too vague in defining the "permitted hours" for "indecent" words. We have already noticed that, by putting together disparate references in the order, one may deduce that the ban will last until 10:00 p.m. (*supra*, p. 15). Judge Leventhal, however, would not hold the Commission to that indication (A. 104), and in its brief in this Court, the Commission avoids any express statement as to the exempted time.

To be sure, it is arguable that the question of the exact duration of the ban is not presented here; that it is enough to know that it applied at 2:00 p.m. when the Carlin monologue was broadcast. But, by a parity of reasoning, it could be said that the Court need not consider whether the Commission will, at the end of the day, exclude from its ban *any* period whatever. Yet, it is not obvious how the constitutionality of the prohibition can be determined without knowing its limits, if any.

Moreover, as we have said, the Commission's Order was intended to do more than resolve the particular case then before it. And, in any event, the case now having reached this Court, it is in the interest of all those affected, including the Commission itself, to be told the constitutional ground rules. Accordingly, we shall assume what the Commission "intimated": that the absolute prohibition on the broadcast of "indecent" words continues until 10:00 p.m., after which time the ban is conditionally lifted.

3. In our view, such a very limited exemption does not materially alter the constitutional balance. As has been said, a ban continuing until 10:00 p.m. will effectively censor "indecent" words for most of the adult population with normal sleeping habits. And, at the same time, it will not afford the desired protection for a substantial number of young listeners. What is more, a prohibition lasting into the late evening has the same consequence as a total ban for that large number of radio stations that broadcast only during the day.

The suggested compromise is too grudging, and too arbitrary, to salvage the rule. Nor does it appear to us that any different accommodation in terms of large time periods can be justified. The reason is simply that radio listening by children and adults is not confined to discrete hours of the day or night. Indeed, although we do not have statistics, it would seem probable that most adults, most days, confine their radio listening to the daytime, beginning with the radio alarm and ending with the homeward car journey, turning thereafter to television for broadcast enter-

tainment. Juveniles, on the other hand—except for the very young who presumably do not own receivers—may be assumed to be at school for most of that time during the week-days. They, perhaps more than their parents, turn on the radio in the evening, even the very late evening, if only for popular music.

Plainly, a regulation that posits daytime radio listening by children and evening listening by adults is doing violence to reality. Nor do we believe that evening listening by juveniles is usually supervised by parents. We venture the assertion that most youngsters, by mutual consent, play their radios *out* of the hearing of their parents in the evening—whether at young gatherings out of the home or in the privacy of their own rooms. No doubt, some parents attempt to monitor their children's radio listening, but adult supervision of the portable radio in young hands is not, we suppose, the common experience.

We conclude that an arbitrary day/evening division of the radio audience cannot be squared with the First Amendment.

C. A CAVEAT

Our submission is a narrow one: that Section 1464, construed in the light of the First Amendment, does not authorize the Commission's present attempt to absolutely outlaw certain words on radio, wholly without regard to context, for all or most of the broadcast day. If we are right, that conclusion, without more, requires affirmance of the judgment of the court of appeals, and it is unnecessary to consider what, if any, lesser regulation of "indecent" language might be permissible.

Nevertheless, lest we be misunderstood, we wish to make clear our view that neither the Commission nor the Department of Justice is entirely powerless to deal with extreme cases.

First, of course, there may be instances in which the offending words identified here are used in a context that renders the material obscene. One example is *Illinois Citizens Committee for Broadcast* v. *Federal Communications Commission,* 515 F. 2d 397 (C.A. D.C.). So, also, the Court of Appeals for the Seventh Circuit indicated that the broadcasts on a citizen's band radio involved in *United States* v. *Simpson,* 561 F. 2d 53, could have been punished as obscene. *Id.* at 55 n. 1.[11] But we do not stop there.

Notwithstanding the ruling in *Simpson,* we believe the separate statutory prohibition on "indecent" language survives. In our view, that provision, read in light of constitutional limitations, authorizes the imposition of sanctions upon the radio broadcast of the words involved here when, in context, although they do not appeal to prurient interest, they are directed *at* any person, or at the audience generally, in a deliberately hostile manner, or when they are uttered,

[11] The court's opinion describes the broadcasts in this way: "Simpson used the citizens band radio transmitter in his home to broadcast explicit references to sexual activities, descriptions of sexual and excretory organs, and abusive epithets directed to other radio operators with whom he was communicating, all in street vernacular. [and] [h]is broadcasts were received not only on citizens band radio but on AM radio, television, and telephones" (561 F. 2d at 55). On the evidence, the court concluded it "would have had no difficulty in affirming a finding that the language was obscene," but was bound by a jury verdict that the broadcasts were "indecent" only and not "obscene" (*id.* at 55 n. 1).

not innocently or merely for emphasis, but are spewed forth without any arguable justification in a conscious attempt to shock, offend or outrage. However rare such instances on commercial radio, we suggest Section 1464 yet affords a useful residual power to deal with extreme cases of this kind.

Finally, although the situation is not remotely presented here, we are, at least tentatively, persuaded that the Commission might properly prohibit the inclusion of the offending words in any radio broadcast *specifically directed at younger children,* regardless of when broadcast. No doubt any such rule would present definitional problems. These are, of course, best left to the expertise of the agency, in the first instance. But, for our part, we would not discourage the attempt to fashion such a narrowly drawn regulation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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